## UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD

----X MV PUBLIC TRANSPORTATION, INC. : and : Case Nos. 29-CA-29530 29-CA-29760 JOHN D. RUSSELL, AN INDIVIDUAL : Case No. 29-CA-29544 and LOCAL 1181-1061, AMALGAMATED TRANSIT UNION, AFL-CIO Case No. 29-CA-29619 and ERIC BAUMWOLL, AN INDIVIDUAL and LOCAL 707, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Party to the Contract LOCAL 707, INTERNATIONAL BROTHERHOOD OF TEAMSTERS Case No. 29-CB-13981 and JOHN D. RUSSELL, AN INDIVIDUAL :

BRIEF OF CHARGING PARTY
LOCAL 1181-1061, AMALGAMATED TRANSIT UNION, AFL-CIO
IN SUPPORT OF CROSS-EXCEPTIONS

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## PRELIMINARY STATEMENT

Charging Party Local 1181-1061, Amalgamated Transit Union,
AFL-CIO ("Charging Party" or "Local 1181") respectfully submits
this brief in support of its Cross-Exceptions to the June 7,
2010 Decision of Administrative Law Judge Michael A. Rosas ("the ALJ").

Local 1181 today filed an Answering Brief to Respondents' Exceptions to the ALJ's Decision. As stated in Local 1181's Answering Brief, Local 1181 agrees with the ALJ's conclusions that Respondents violated the Act and that Charging Party Russell's charges are not untimely. Local 1181 files these Cross-Exceptions in an abundance of caution and to preserve its positions.

I. The ALJ erred by failing to find that MVPT recognized Local 707 as the exclusive bargaining representative of MVPT's drivers, mechanics, and utility workers.

MV Public Transportation's ("MVPT") General Manager
Rapacioli testified that, at the time of the recognition
agreement between MVPT and Local 707, International Brotherhood
of Teamsters ("Local 707"), MVPT recognized Local 707 as the
representative not only of its drivers, but also of its

<sup>&</sup>lt;sup>1</sup>Citations herein to the ALJ's Decision are to "ALJD". Citations to the transcript of proceedings in this case are to "Tr. \_\_". Citations to exhibits are identified by party designation ("Jt.", "GC", "1181", "MVPT", or "707") followed by "Ex. ".

mechanics and utility workers. <u>See</u> Tr. 455, 458-59. No witness disputed this admission or identified another date when MVPT and Local 707 agreed to add mechanics and utility workers to the bargaining unit. When MVPT and Local 707 entered a collective bargaining agreement, mechanics and utility workers were included in the description of the bargaining unit. <u>See</u> ALJD p. 10, 1. 25-27, p. 11, 1. 1-4; Jt. Ex. 1.

The ALJ did not make a finding as to the composition of the bargaining unit for which MVPT recognized Local 707 as the bargaining representative but merely stated the description of the bargaining unit set forth in card check and neutrality and recognition agreements. See ALJD pp. 8-9.

Based on the undisputed testimony, the ALJ should have found that, at the time of recognition, MVPT recognized Local 707 as the exclusive bargaining representative of MVPT's drivers, mechanics, and utility workers.

II. The ALJ erred by failing to find that MVPT did not employ a representative complement of employees at the time of recognition because MVPT at that time employed employees in, at most, one of three bargaining unit positions.

For the reasons stated in our Answering Brief submitted today in opposition to Respondents' Exceptions, the ALJ correctly held that MVPT did not employ a representative complement of employees at the time of recognition.

However, the ALJ's conclusion was correct for the additional reason that, at the time of recognition, MVPT employed employees in, at most, one of three bargaining unit positions.

In determining whether an employer at the time of recognition employed a representative complement of its workforce, the Board looks for guidance to the standard set forth in General Extrusion, 121 NLRB 1165 (1958), in which the Board found that a contract would bar an election if, compared to the hearing date, the employer employed 30 percent of its employees in 50 percent of the job classifications when the contract was signed. See id. at 1167. The Board does not rigidly apply General Extrusion to a set point in time but considers the goal of balancing the interests of current employees with those to be hired in the future. See Hilton Inn Albany, 270 NLRB at 1365.

On the date of recognition, MVPT employed 22 drivertrainees and no regular drivers, mechanics, or utility workers.

See ALJD p. 8, 1. 24-26, p. 14, 1. 26-31; GC Ex. 8(b); see also
GC Exs. 30-31. However, as noted above, MVPT recognized Local
707 as the representative of employees in a unit of drivers,
mechanics, and utility workers. See Tr. 455, 458-59. This was
reflected subsequently in the unit description in MVPT and Local

707's collective bargaining agreement. <u>See</u> ALJD p. 10, l. 25-27, p. 11, l. 1-4; Jt. Ex. 1.

MVPT recognized Local 707 before MVPT employed workers in at least two of its three bargaining unit job classifications. See GC Exs. 30-31.

Accordingly, MVPT prematurely recognized Local 707.

III. The ALJ erred in finding that October 5, 2008 would be an appropriate accrual date for purposes of Section 10(b).

The ALJ held that an alternative date from which to measure the Section 10(b) period would be October 5, 2008. The ALJ reasoned that this is the date when employees learned of Local 707's representative status. See ALJD p. 19, 1. 22-23. October 5, 2008 is the date that the ALJ found that MVPT posted the Dana notice. See ALJD p. 10, 1. 12, p. 16, 1. 50-51.

As set forth in our Answering Brief, the ALJ erred because the Section 10(b) period could not begin before Charging Party Russell had notice of a violation of the Act, which did not occur until at least October 20, 2008. See Local 1181's Answering Brief at 26-27; Dedicated Servs., 352 NLRB at 759-60; ALJD p. 11, 1. 21, p. 18, 1. 42-43. In Dedicated, the Board upheld the ALJ's rejection of a Section 10(b) defense where there was no evidence that the charging party had knowledge of the violation outside the Section 10(b) period. The ALJ refused to impute individual employees' knowledge of the premature

recognition to the charging party union. <u>See Dedicated Servs.</u>, 352 NLRB at 759.

Applying those same principles here, because Charging Party Russell did not commence his employment until October 20, 2008, and did not know that MVPT recognized Local 707 until that time, the Section 10(b) period could not have begun to run on October 5, 2008 merely because MVPT posted the Dana notice on that date. The earliest possible date under <u>Dedicated</u> for the Section 10(b) period to commence is October 20, 2008.

As also stated in our Answering Brief, October 5, 2008 is not an appropriate accrual date because the Dana notice, if posted in the drivers' room, would not have been reasonably observable and because employees would not have had notice on October 5, 2008 that the recognition was unlawful. See ALJD at 17.

Accordingly, the Section 10(b) period could not accrue on October 5, 2008. Nonetheless, should the Board affirm the ALJ in this respect, we note that Russell's charges remain timely filed.

IV. The ALJ erred to the extent he found that MVPT only provides services in Staten Island or to passengers on Staten Island.

As set forth at page 14 of our Answering Brief to

Respondents' Exceptions, the record evidence demonstrates that

MVPT operates, and other paratransit companies operate,

throughout all the boroughs of New York City and is not restricted to Staten Island. <u>See</u> Tr. 394, 452. To the extent the ALJ found to the contrary, this finding should be reversed.

## CONCLUSION

For the foregoing reasons, Local 1181's Cross-Exceptions should be granted.

Dated: New York, New York August 11, 2010 Respectfully submitted,

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